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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 86-359

SUPREME COURT OF THE UNITED STATES

OCTOBER 1986 TERM

ARISTIDES CASTRO GONZALEZ

APPELLANT

VS.

THE COMMONWEALTH OF PUERTO RICO;
BANCO DE PONCE;
CONTINENTAL CASUALTY COMPANY; and
CNA CASUALTY OF PUERTO RICO

APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF PUERTO RICO

MOTION TO DISMISS

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES OF AMERICA:

NOW APPEAR CONTINENTAL CASUALTY COMPANY, CNA CASUALTY OF PUERTO RICO and BANCO DE PONCE, represented by their undersigned attorneys and respectfully plead as follows:

On the 3rd day of September 1986 the Supreme Court of the United States docketed the above-captioned case on the basis of an appeal from a determination of the Supreme Court of the Commonwealth of Puerto Rico. The matter stems from an execution of mortgage and judgment which concluded in a public sale of the subject property, all in compliance with the provisions of Rule 51 of the Puerto Rico Rules of Civil Procedure for such execution and sale and specifically Rule 51.8(a) which reads as follows:

> "(a) Notice of Sale. Before the sale of the property on execution is held, notice thereof shall be published

> during two (2) weeks by posting written notice in three public places of the municipality where the sale is to be held, such as the city hall, the court and the collector's office. Said notice shall be posted also at the collector's office and at the public school of the place where defendant has his residence, if it is known, or in one of the newspapers of general circulation in the Commonwealth of Puerto Rico, during two (2) weeks, and at least once a week. The notice of sale shall adequately describe the property on sale, and shall also mention the judgment to be satisfied through said sale, indicating the place, day and time when the sale is to be held."

It is not the contention of appellant Engineer Arístides Castro González that the appellees failed to comply with the provisions of the local rules. It is, however, the contention of Engineer Arístides Castro González, herein appellant, that the Puerto Rican statute, in not requiring a personal notification to the defendant-debtor in the public sale phase proceedings, constitutes a violation of his constitutional right to due

process of law and further constitutes an undue taking of the appellant's property, all in violation of the Constitution of the United States of America and its Fourteenth Amendment.

Because this is the sole contention of the appellant we would not burden this Court with a review of all facts leading to the public sale which were in strict compliance with the Puerto Rican statute and particularly Rule 51.8(a) Notice of Sale. In order for the Court to have a clear view of the entire situation, however, we shall briefly relate the facts as follows:

Appellant Arístides Castro González and his wife Haydée Piñeiro were owners of the property located at Cupey Alto Ward, Río Piedras, Puerto Rico, onto which they voluntarily executed a mortgage in favor of Banco

de Ponce for the principal sum of $20,000.00 plus $11,162.91 of accumulated interest at the rate of $9.86 per day. They also executed another mortgage over the same property and in favor of CNA Casualty of Puerto Rico in the amount of $162,000.00 on 31 May 1976 pursuant to public deed number 3 before Notary Public Francisco J. Cobián Guzmán.

On 31 August, 1978 Banco de Ponce filed an action to execute on the basis of a complete total non-payment by the appellant. The couple was served personally on 12 September 1978. Because they failed to make an appearance, at the request of appellee Banco de Ponce, default was entered on 28 December 1978.

Subsequently the Court allowed the appellants to appear represented by their counsel Raúl Bocanegra Saldaña, Esquire, with

a motion for summary judgment. After argument this motion was denied and the case was scheduled for trial on its merits on 13 February 1979.

Both parties appeared at the hearing represented by their respective counsel.

After the presentation of evidence the Superior Court of San Juan entered judgment on 20 February 1979, which was notified to all parties on 2 March of the same year through their attorneys at their respective address of record.

In the meantime CNA Casualty of Puerto Rico, surety for Arístides Castro González in his contracts with the Public Building Administration for the construction of several schools and who was obliged to complete said schools after his default, had also obtained a judgment before the Superior Court of San

Juan on 16 November 1979 in execution of a mortgage voluntarily given by Arístides Castro González and his wife Haydée Piñeiro. On 20 October 1980 CNA Casualty of Puerto Rico acquired the rights from Banco de Ponce by satisfaction of the total judgment for the first mortgage in favor of said bank. After the Court approved the acquisition of the Bank's interest by CNA Casualty of Puerto Rico, the process of execution continued having Superior Court Marshall Ferdinand Rodríguez Molina issued a notice of public sale on 12 September 1980 to be published in a newspaper of general circulation in the Commonwealth of Puerto Rico, once a week, for two consecutive weeks, and to be placed in the customary public locations. The notices were published in the newspaper "El Nuevo Día" on the days 25 September and 2 October,

both in 1980. In addition to that, the notices were placed in the Judicial Center of San Juan located in Hato Rey, Puerto Rico; in the collection center for internal review for the Municipality of Río Piedras, in Río Piedras, Puerto Rico, and in City Hall for the Municipality of San Juan, all commencing on 30 September 1980.

These locations are the customary ones to be used in satisfaction of the provisions of Rule 51.

In addition to the above, and further to the provisions of Rule 51, appearing counsel forwarded Arístides Castro González and his wife a copy of the notice of public sale that had been authorized by Superior Court Marshall Ferdinand Rodríguez Molina to their attorney Raúl Bocanegra Saldaña, Esquire, at

his address by certified mail requesting a return receipt.

At the expiration of the days provided by Rule 51, the public sale was held according to the notices of public sale at 10:30 A.M. on 21 October 1980 in the offices of the Marshall for the Superior Court of San Juan located in the Judicial Center, Hato Rey, Puerto Rico.

Pursuant to the aforementioned documents the property was adjudicated to CNA Casualty of Puerto Rico in the absence of any other bidder.

Arístides Castro González and his wife failed to appear.

The present action was filed at 2:31 P.M. before the Superior Court of San Juan on 29 October 1985.

It should be emphasized here that the appellees, in addition to complying with all of the provisions of Rule 51, went on further as indicated above and by letter executed by Angel Alvarez Pérez, Esq., as counsel for co-defendant Banco de Ponce, notified Raúl Bocanegra Saldaña (since deceased), and during the execution and public sale proceedings counsel for appellant Engineer Arístides Castro González, by letter of 3 October 1980, certified with return receipt requested, a copy of the public notice for sale wherein Ferdinand Rodríguez Molina, Marshall for the Superior Court of San Juan, advised that pursuant to an Order of Execution of Judgment, he would sell at a public auction to the highest bidder the property subject of this matter on 21 October 1980 at 10:30 A.M. at his offices in the Judicial Center located at

Muñoz Rivera Avenue corner of Toll y Toste Street, Hato Rey, Puerto Rico.

This notice further described in detail the property to be so auctioned.

According to the Civil Procedure Rules for the Commonwealth of Puerto Rico, when a party is represented by counsel, notification to counsel will constitute notification to the party.

"Rule 9. Signatures on Documents.

> All document of a party represented by counsel shall be signed by at least one attorney of record with his own name, indicating his address and telephone. A party not represented by counsel shall sign his document and shall express his address and telephone, if he has one. The attorney or the party must notify immediately the Court, under the caption of the case, of any change in the address or telephone, except where specifically indicated to the contrary, by Rule or by law, and it shall not be necessary to execute under oath any document and need not be accompanied by a sworn statement. The signature of an attorney is equivalent to certifying the having

> read the document; that according to his better judgment, information and belief, it is well founded; and that it has not been filed to cause delay or oppression. If a writing were not signed, or was signed for the purpose of frustrating the objectives of the rules, it may be eliminated as pretentious and false, and the case may continue as if it had not been notified. The voluntary violation of this rule by an attorney will cause an imposition of sanctions against him. Like action will be taken if defamatory or improper material is introduced or if offensive and crude language is utilized."

The Puerto Rico Supreme Court in In Re: Carlos Silverio Orta, 86 JTS 18 (1986) held that once an attorney signs and files a complaint, he assumes the responsibility of carrying out the legal representation with the highest possible levels of diligence and competence. Said responsibility, added the Court, shall continue until the Court relieves counsel of the same by accepting his resignation as attorney of record. See In Re: Carlos Silverio Orta at p. 4223. The

Court also stated in case that the Motion to Withdraw Legal Representation is a request that must offer reasons which would enable the Court to grant counsel's petition.

The Puerto Rican Supreme Court clearly established in the above case that so long as the Court does not allow counsel to withdraw as attorney of record, he must continue to carry out his professional responsibility.

Rule 67 of the Puerto Rican Rules of Civil Procedure (PRRCP) deals with notice and notification of motions. In its relevant section, Rule 67.2 states:

> "67.2 Service; how made
>
> Whenever a party has appeared represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the Court. Service upon the attorney ... shall be made by delivering a copy to him or by mailing it to him at his last known address ... Service by mail is complete upon mailing.

Mr. Raúl Bocanegra Saldaña, Esq., was not relieved by the Court of his professional responsibility to the appellant, and therefore, at the time notice was forwarded to his attention he was Appellant Arístides Castro Gozález's attorney of record. As such Arístides Castro González was deemed by law to have been personally advised of the public sale.

In light of PRRCP 67.2 and of the fact that Mr. Raúl Bocanegra Saldaña, Esq. was still the attorney of record at the time notice was given, appellant's argument regarding lack of notice is ill founded. Appellant's contention that appellees did not know whether Mr. Raúl Bocanegra Saldaña was alive when notice of the public sale was given him is also without merit, as the Puerto Rico Bar Association's records indicate that brother

Raúl Bocanegra Saldaña (RIP) passed away on February 22, 1985, that is, almost five (5) years after notice was given him of the public sale.

In its jurisdictional statement, appellant cites Mennonite Board of Missions vs. Richard Adams, 462 US 791, 77 L.Ed. 2d 180 (1983) as the leading case in matters of notice. Mennonite holds that the publication and placing in public sites of the public sale edicts is not sufficient notice to a mortgagee of a judicial sale, under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

It first should be noted the clear distinctions between Mennonite and the present case.

The matter of Mennonite Board of Missions vs. Richard Adams, supra, referred to a

mortgagee's right to be advised of the sale of the mortgaged property. In the matter of caption it is the owner who is alleging the unconstitutionality of the provisions of Rule 51.8(a) of the Rules of Civil Procedure for the Commonwealth of Puerto Rico in its requirement for notice of a public sale.

It should also be noted that in the present case it is the mortgagee who has commenced the process of execution which culminates in the public sale of the mortgaged property.

In the matter of Mennonite the action was taken pursuant to a state statute allowing for the sale of property to obtain satisfaction for non-payment of taxes to the state of Indiana, which required the county auditor to post notice in the county courthouse of the sale of said property and to

publish notice once each week for three consecutive weeks. It further called upon the auditor to notify the property owner by certified mail, but the statute had no provisions to notify by mail or personal service to any known mortgagee of the property.

Such a situation is totally different to the situation in the present action where the provisions of Rule 51.8(a) clearly establish how the owner-debtor-mortgagor is to be notified of a public sale.

It has been abundantly made clear that the appellees complied with each and every such provision.

The United States Supreme Court stated in Mennonite that the analysis to be used would follow the analysis of Mullane v. Central Hanover Bank & Trust, 339 US 306, 94 L.Ed. 865 (1950).

It stated in Mullane, supra:

> "the court recognized that prior to an action which will affect an interest in life, liberty or property protected by the Due Process Clause of the Fourteenth Amendment, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Under all the circumstances of the situation before us, the notice given to appellant was one reasonably calculated to apprise him of the impending public sale of his property. As set forth above; appellants were personally served; they appeared with counsel; their counsel filed a motion for summary judgment which was denied; trial was held and judgment was notified to their counsel; the public sale edicts were published and placed in the public places as required by the law and, in addition to all of the above, appellants' counsel was notified by

certified mail of the pending sale in public auction, eighteen days prior to the date of sale.

Undoubtedly, these notices were more than sufficient and reasonable under all the circumstances of the case, to apprise appellants of the foreclosure on the mortgage of their home and the impending public sale of same.

In Nelson vs. New York, 352 US 103, L.Ed. 2d 171 (1956), the Supreme Court of the United States held:

> "... that the foreclosure by default judgment and subsequent sale of the property did not file due process where, in compliance with the statute, not only were notices of the foreclosure proceeding posted and published but also copies of the published notices were mailed to the last-known address of the trustees, even though the mailed notices of the foreclosure proceedings were concealed by the trustees' bookkeeper, who received them."

The circumstances in Nelson are very similar to the case before us. As in the case at bar, in Nelson, all requisites set out by the law were complied with and in addition to, the trustees were notified by mail to their last known address. Said notices, which were the same as that given to appellant Arístides Castro González, did not violate the due process clause as interpreted and decided by the Supreme Court of the United States.

The notices given to appellant Arístides Castro González in the case at hand were more numerous and extensive than those given the trustees in Nelson.

In Figueroa vs. Banco de San Juan, 108 DPR 680, 690 (1979), the Puerto Rican Supreme Court held that "in regard to the foreclosure procedure, the law does not require personal

notice to the property owner after judgment is obtained." Figueroa further held that "it is proper to assume that all litigants know the consequences of a judgment against them, and therefore ... should know that the judgment would be executed against the mortgaged property in the note they pledged." Figueroa, supra, p. 690. It further cited Albaladejo vs. Vilella Suau, 106, DPR 331 (1977) and Avilés Vega vs. Torres, 97 DPR 144 (1969).

The Superior Court of San Juan and its chamber presided by Superior Court Judge Nellie Ortiz Torres determined, in entering judgment against the appellant and in favor of the appellees, that the matter for determination was governed by Rule 51.8(a) Judicial Sales of the Rules for Civil

Procedure for the Commonwealth of Puerto Rico.

As is evident from the facts of this case, appellees complied with all the requisites of Rule 51.8(a). In addition to complying with the Rule appellees' legal counsel notified Mr. Arístides Castro's counsel, via certified mail, the date, time and place of the public auction. See Exhibit "F".

Appellant maintains in his jurisdictional statement before this Court that the additional notice sent by certified mail to its counsel is not sufficient under the due process clause of the Fourteenth Amendment. The allegation is based on appellant's contention that there was no guarantee said notice was received by the person with the endangered right, and further

alleges that appellees did not know if the attorney-client relationship was in effect or even if the attorney was alive at the time.

The record reflects that on the date the trial court notified judgment, to wit, March 2, 1979, and at the time the additional notice of the public sale was mailed to Raúl Bocanegra Saldaña, esq., he was still Mr. Arístides Castro González's attorney of record. Mr. Raúl Bocanegra Saldaña, Esq., never filed a motion to withdraw legal representation and not having been relieved of his responsibilities by the Court, he remained as Mr. Arístides Castro González's attorney of record.

WHEREFORE, all in harmony with the above, the appellees respectfully request the Supreme Court of the United States of America to deny the issuance of the writ sought by

appellant and enter an order dismissing the appeal as failing to show that Rule 51.8(a) of the Rules for Civil Procedure for the Commonwealth of Puerto Rico violates the provisions of the Fourteenth Amendment and its due process requirements.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 10 day of December, 1986.

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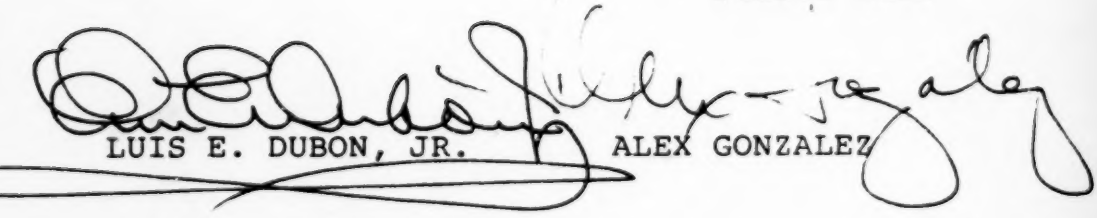

LUIS E. DUBON, JR. ALEX GONZALEZ

WE HEREBY CERTIFY: That a true and exact copy has been sent by first class pre-paid mail to Attorneys Robert J. Walser, Esq., G.P.O. Box AL, San Juan, Puerto Rico, 00936 (representing appellant); and Laura Ydrach Vivoni, Apt. 192, San Juan, Puerto Rico, 00902 (representing the Commonwealth of Puerto Rico).

LUIS E. DUBON, JR. ALEX GONZALEZ